

**RE: Law Firm Definition
11/19/04 Commission Meeting
Open Session Item III.C.**

**RE: Law Firm Definition
10/8/04 Commission Meeting
Open Session Item III.D.**

MEMORANDUM

TO: Members of the Commission
FROM: Mark L. Tuft
DATE: September 26, 2004
RE: Law Firm Definition (Open Session Item III.D)

At the last meeting, it was proposed that we consider a single definition of “law firm” for purposes of the rules. I submitted a proposed law firm definition, with various options, as part of the materials on rule 1-310X for the December 12, 2003 meeting – Open Sessions Item III.D. (See Draft No. 2, dated December 1, 2003). Jerry Sapiro commented on the draft in his email to the Commission, dated December 10, 2003. Stan Lamport has crafted a proposed definition in connection with rule 2-200 in his email to the Commission, dated August 10, 2004.

The following proposed law firm definition is adapted from Model Rule 1.0(c) with several modifications based on CRPC 1-100(B)(1) and is intended to apply to all of the rules of professional conduct.

Definition of Law Firm

"Law firm" means a lawyer or lawyers in a law partnership, professional law corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, a government entity or other organization.

Drafter's notes

1. The law firm definition has two parts: (1) lawyers engaged in private practice and (2) lawyers employed by a private or public entity.
2. The first part should be limited to recognized forms of practice that are authorized to practice law.
3. The definition focuses on lawyers and not on entities. A law firm may or may not be an entity depending on the circumstances. For example, a sole practitioner that employs other lawyers, either full time or on a temporary basis, is generally considered a law firm under the rules. Another example, cited in Comment 2 to Rule 1.0(c), involves solo practitioners who share office space and who may be regarded as a law firm depending on how they are held out to the public. Also, as the comments to rule 1.0(c) point out, a combination of lawyers may be regarded as a law firm for one purpose and not for another.

4. The definition in current rule 1-100(B)(1)(a) (“two or more lawyers whose activities constitute the practice of law and who share profits, expenses and liabilities”) is under inclusive in private practice today and should not be retained.

5. The second part of the definition should expressly include a government organization for greater clarity.

6. The definition omits the distinction in rule 1-100(B)(1)(c) and (d) between lawyers employed by a business entity to perform legal services for that entity and lawyers employed by a publicly funded entity to perform legal services to the public or to other clients. This distinction is not essential to the definition of law firm. If it is needed, it could be made a comment.

7. The proposed definition has been drafted with the intent that it be compatible with other jurisdictions to the extent possible in order to avoid confusion and unnecessary barriers to cross boarder practice.

8. An issue for discussion is whether we should adopt comments similar to Comments 2, 3 and 4 to rule 1.0(c).

Memorandum

To: Rules Revision Commission

From: Stanley W. Lamport

Date: August 10, 2004

Re: Rule 2-200 - Law Firm Definition

As the Commission will recall, an open issue with respect to the draft revision to rule 2-200 concerns the definition of “law firm.” The following is my suggested definition, which consists of two parts, a law firm definition and a definition of when a lawyer is part of a law firm.

A. Law Firm Defined

“Law firm” means an association of two or more lawyers practicing law together, including

(A) An association whose activities constitute the practice of law consisting of two or more lawyers who share profits, expenses and liabilities, including a partnership, corporation and limited liability partnership or company.

(B) A sole proprietorship or professional corporation whose activities constitute the practice of law that employs more than one lawyer.

(C) A division, department, office, or group within a business or governmental entity whose activities constitute the practice of law that consists of more than one lawyer.

(D) A publicly funded entity whose activities constitute the practice of law that consists of more than one lawyer.

B. Lawyer As Part of a Law Firm

A lawyer is part of a law firm if the lawyer has an ownership interest in the law firm or has a close, personal, continuous and regular relationship with the law firm.

C. Thoughts and Comments

My criticism of the law firm definitions that have been swirling around so far is that they do not have an entity focus. A law firm is an entity (whether incorporated or unincorporated). The definition should focus on the entity, which I try to do in this draft.

I have tried to keep the law firm definition broad and flexible, which is why I used the term “association.” Our current definition in rule 1-100 focuses more on types of entities, which is not as inclusive as the definition I am proposing. An added concern is that we not adopt a definition that is “culture bound” in the sense of assuming the kinds of entities that are common today and not leaving room for new kinds of entities to arise in the future. The “association” terminology addresses that concern.

At the same time, I have narrowed the focus of the definition to associations to practice law, which would exclude from the definition associations between lawyers to perform non-legal services.

The definition is also limited to the concept of an association of two or more lawyers. It excludes associations between a lawyer and non-lawyers to provide legal services, which is prohibited under other rules.

The lawyer as part of a law firm rule relies heavily on the terminology in Standard 8 in rule 1-400. Rather than focusing on whether there is an employment relationship, which plagues our current definition of associate, I have picked up the close, personal, continuous and regular language to characterize the relationship. A lawyer does not have to meet an employment test to be part of a law firm, but the lawyer has to have a close enough relationship to meet the client expectation that the lawyer is part of the firm, which the Standard 8 language seeks to achieve.

I considered limiting the lawyer in firm definition to lawyers who regularly and continuously practice law under the name of the law firm, but ultimately rejected the concept. The lawyer in the firm definition I have drafted is broader. It includes lawyers who are not practicing law under the name of the firm, but otherwise meet the elements of the relationship test. This would include retired or non-equity partners who do not have an ownership interest and, in the case of the former at least, may not be practicing law with the firm. This approach also embraces some conflict of interest concepts, which I think are already the law since at least *Speedee Oil*.

Assuming we go with something along the lines of this definition, I would revise the discussion to rule 2-200 to replace “outside lawyer” with “a lawyer who is not part of the member’s law firm,” which would address the comment from Becky Stretch.

-----Original Message-----

From: Jerome Sapiro, Jr. [mailto:JSapiro@sapirolaw.com]

Sent: Wednesday, October 06, 2004 12:52 PM

To: Tuft, Mark L.

Cc: Hollins, Audrey; McCurdy, Lauren; Difuntorum, Randall; Mohr, Kevin E.; Voogd, Anthony; Ruvolo, Hon. Ignazio J.; Peck, Ellen R.; Melchior, Kurt W.; Martinez, Raul; Lamport, Stanley; Julien, JoElla J.; George, Edward P.; Foy, Linda Quan; Betzner, Karen; Vapnek, Paul W.; Sondheim, Harry B.

Subject: Definition of Law Firm

Dear Mark:

I think you have done an excellent job with your proposed revision.

However, your drafter's note 3 highlights a broader concern that I have. By defining a "law firm" as proposed, we may be precluding the application of a rule to a given fact situation when we would not have intended to exempt the lawyers from disciplinary liability. For example, although we have not started to work on a revision to Rule 3-310, if we adopt the definition of a "law firm" at this time, along the lines of your recommendation, we may be exempting the lawyers in the law firm described in the second and third sentences of your note 3 from disciplinary liability for violations of Rule 3-310.

I think it would be easier to decide whether to define a "law firm" and, if so, how, after we see the context in which our substantive rules use the phrase "law firm." Otherwise, we will have to try to imagine all of the later possible uses of that phrase in our rules in order to draft a definition in advance. I think we will be more accurate if we suspend this project, retain your current draft, and come back to it after the substantive rules have been drafted, retain.

With best regards,

Jerry

CONFIDENTIAL E-MAIL from THE SAPIRO LAW FIRM

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Excerpt from October 3, 2004 E-Mail Message from Kurt Melchior

Re Definition of Law Firm

The definition Mark proposes is fine as far as it goes. **BUT:**

As Mark states, “a firm may or may not be an entity depending on the circumstances.”
Therein lies the rub.

I agree that law firms are (in part) regulated entities and are (in part) an element of the fabric of the practice of law which we propose to regulate. Still, simply thinking lightly on the subject, many issues arise from this seemingly modest definitional step. Just for openers, are we regulating law firms? If so, where is the authority to do so, and what is the scope of potential sanctions which could be imposed? Is the firm the sole object of the regulation, or are the lawyers in the firm subject to account for the firm’s failures? Is such accounting for individual lawyers disciplinary or civil or both? **Which** lawyers in a firm do we propose to hold accountable, and on what conditions? Will those conditions be defined? If the firm fails, is the accountability at an end (viz, Brobeck)? If a lawyer leaves the firm, same question (viz, Kent and Aguilar)?

If we say, “depending on the circumstances,” need we specify the circumstances? Any or all of them? What about the many situations in which respondents of various hues will say there was not a law firm, or they were not involved, or not the decision makers?

I urge that we spend more time on these questions and that we step very carefully.